Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-473

REBECCA REYHER,

Petitioner,

—v.—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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No. ....

REBECCA REYHER,

Petitioner,

—v.—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Rebecca Reyher respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit on April 5, 1976.

Opinions Below

The opinion of the Court of Appeals is reported at 533 F.2d 87 and appears in the Appendix hereto (1a-11a). The opinion of the District Court for the Southern District of New York is reported at 387 F. Supp. 869 and appears in the Appendix hereto (13a-20a). A memorandum opinion of the District Court denying defendants' motion for summary judgment is unreported and appears in the Appendix hereto (20a-26a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 5, 1976. A timely petition for rehearing and rehearing en banc was denied on July 7, 1976 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals exceeded its jurisdiction under Rule 52(a) of the Federal Rules of Civil Procedure in reversing the findings of fact by a trial court in the absence of a ruling that such findings were "clearly erroneous"?

(a) In this connection the Court of Appeals disregarded and ignored the record submitted in the trial court and reached a contrary decision unsupported by the facts and exhibits in evidence.

2. Whether the Court of Appeals pursuant to Federal Copyright Law (17 U.S.C. § 101) is compelled after a plenary trial for infringement of copyright that yielded a finding of fact by the court of similarity to and access by defendants to the plaintiffs' work, to render a judgment for a plaintiff who has complied with the Act in registering an original work.

Statutory and Constitutional Provisions Involved

The statutory and constitutional provisions involved are:

Federal Rules of Civil Procedure, Rule 52(a) 17 U.S.C. § 101 and Article I, Sec. 8, cl. 8 of the Constitution

of the United States. Relevant portions of these provisions are reproduced in Appendix B.

Statement of the Case

Plaintiffs were owners of a copyright in a book entitled "The Most Beautiful Woman in the World" first registered in 1945 (No. A187751) (Exhibit 1).[1] The story was written by plaintiff and petitioner Rebecca Reyher and illustrated by plaintiff Ruth Gannett. Judge Cannella found that the book

> "tells a simple but pointed story. In essence, it relates the tale of a small Russian peasant girl who is lost in the Ukraine. The little girl, having been separated from her mother, makes her way to a village where she tells the inhabitants only that 'my mother is the most beautiful woman in the world'. Upon hearing this the villagers proceed to search the surrounding area and to bring all of the local beauties to see the little girl in the hope that one of them will turn out to be her mother. Eventually, the little girl's mother does appear. She is, to the villagers' surprise, a rather homely looking woman. The little girl, however, is not surprised and tells the villagers, 'this is my mother, the most beautiful woman in the world.' The moral, as the village leader points out, is that 'we do not love people because they are beautiful, but they seem beautiful to us because we love them.'" (A. - A.).

Plaintiff Reyer testified that she heard the story as a child from her mother (T. 69) who "frequently did change or make up stories" (T. 148). The story was com-

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[1] References to Exhibits are Trial Exhibits admitted in evidence below. References to T. are to pages in the transcript of the trial before Judge Cannella.

municated from mother to child orally in the Russian language (T. 71). Mrs. Reyher testified that she did not hear the story from anyone other than her mother (T. 148), nor did she know of her own knowledge whether or not there was a Russian folktale similar to the story her mother told her (T. 147). No other evidence was presented indicating that there was a story in the Russian —or any other—language prior to Mrs. Reyher's writing of the copyrighted book.

Defendants conceded that plaintiffs' work was the only version of the story in the English language (T. 273), and they offered no evidence of any other version in any language.

Plaintiff Reyher testified at length concerning the writing, in English prose, of a book suggested by a story which she had heard many years earlier as a child, a task which was both creative and taxing. (T. 71-73).

In November of 1970, Children's Television Workshop produced a puppet play set in Russia and entitled "The Most Beautiful Woman in the World" (audio transcript of video tape: "Exhibit 13") which Judge Cannella found to be substantially similar to plaintiffs' copyrighted book. Shortly thereafter defendant Children's Television Workshop produced an illustrated magazine article ("Exhibit 9") which Judge Cannella also found to be substantially similar to plaintiff's copyrighted book. Defendant Tuesday Publications, Incorporated published an issue of "Tuesday at Home" magazine which contained an illustrated article ("Exhibit 11") in which the locale had been changed from Russia to Africa where again, Judge Cannella found similarity. The drawings for the original Sesame Street text (Exhibit 14A-14F) showed a Russian setting later changed in the published story, to Africa.

The script for the television program was written by Jon Stone, a defense witness in the trial. The other allegedly infringing publications by defendants were written after Stone's script was dramatized and televised. Defense counsel conceded that "If Stone did infringe, it follows that the others did infringe." (T. 5).

Stone wrote his script sometime in the autumn of 1970. He testified that he first heard the story which he dramatized "around 1950" (T. 158) or about five years after plaintiffs' book was published. The story he heard was in English. Stone testified that he heard the story from either his mother or his sister's baby-sitter (T. 158), neither of whom understood the Russian or German language; nor did he know the source of the story told by the storyteller. (T. 212).

Judge Cannella, in his written opinion enbodying his findings of fact, found Stone's script to be substantially similar to plaintiffs' book, to present "an identical sequence og events" as plaintiffs' book (14a), and to contain at least one sentence ("Once upon a time, long, long ago") which is a verbatim replica of plaintiffs' words. He also found access: "The most that could be said is that they [the defendants] have read the plaintiffs' work and have retold the story in their own words." (16a). This finding followed from the fact that at least 120,000 copies of plaintiffs' book had been distributed (T. 120), and it had attracted widespread fame when it was awarded literary prizes. (T. 100, 104).

The District Court dismissed the complaint after a trial on all the issues on the grounds that plaintiffs' copyrighted work was not entirely plaintiff's "original intellectual product' as opposed 'to the old public domain elements of which [the author] has made use' "—the court held that it was a derivative work. The District Court said that the plot and sequence of events belonged to the

Russian folktale and were not protected by the copyright laws. Said the District Court:

> "In a sense, the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child. There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher herself. Thus, defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws." (16a, 17a)

The Court of Appeals held as a matter of law that Mrs. Reyher's work was not derivative on the basis of the record below and it reversed the District Court on its finding on the law that the plaintiff's book was a "derivative work". This had been the only issue briefed in the Court of Appeals by plaintiffs-appellants and the appellate court agreed with plaintiffs' position on this issue. Said the court below:

> "Reyher admittedly borrowed the 'idea' embodied in the story from her mother. The basic plot of this children's book is very simple. . . . Reyher's presentation of the story line was entirely her own. Aside from its theme, she could neither recall the exact story her mother told nor the precise language used. More importantly, no tangible or intangible prior work was proved with sufficient detail to enable a court to judge either whether substantial copying of anything other than the idea of the prior work had occurred or which part of her adaptation constituted her own new, and thus protected, material. In light of the absence of such evidence, to characterize Reyher's work as derivative merely because she used memories of her mother's story would create problems in protecting any literary endeavor as well as exacerbate the difficulty in determining the protection to be afforded a particular effort." (5a)

The court below then affirmed the District Court's dismissal of the complaint on completely different grounds, which had not been briefed or argued below. It reversed the express fact finding of the District Court without holding or suggesting that such fact-finding was "clearly erroneous" as required by F.R.C.P. 52(a). Said the court:

> "Although we disagree with the district court's 'derivative work' rationale, we nevertheless affirm its dismissal of this case on the ground that any similarities between the two works related only to non-copyrightable matter. In reaching this conclusion, we must overturn the trial court's factual finding that there were substantial similarities between the two works. While we recognize that our appellate function usually does not include fact-finding, where, as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the factfinder, 'we are in as good a position as the trial judge' to determine the issue." (5a, 6a)

In the court's discussion which follows, the appellate court revealed that it failed to do its homework and study the exhibits which were before it and, accordingly, it erroneously made the new findings of fact. It discussed plaintiffs' thirty-five page book as focusing on a "Russian family living in the Ukraine" and stated that "*the setting of the story is an important component of the work*" (9a) (emphasis supplied)

The Court of Appeals then disregarded the evidence that the original Sesame Street production in the claimed infringement was a puppet play set in the Ukraine in Russia, showing the traditional Russian onion domes, the Russian fields and babushka-encircled heads of the women, and stated

> "The *Sesame Street Magazine* version of the story, two pages long, presumably is set in Africa. There is no textual detail about African life, any information comes from the five illustrations, which show African dress on the characters, a woman carrying a basket on her head and thatched huts." (A.....)

It thus appears that the Court of Appeals reversed the fact finding of the District Court on the basis of reading one exhibit only (Exhibit 11). The court ignored the other evidence before the court below: a video transcript (Exhibit 12 and 13) which mentioned the locale or setting as Russian and showed a Russian field and town square. In ignoring such evidence, the court argued that the locale was "an important component of the work."

Reasons for Granting the Writ

I.

The court below disregarded the "clearly erroneous" requirement of F.R.C.P. 52(a) and reversed the finding of fact of the court below.

The court below in this case and a line of cases before the instant case has disregarded the rule clearly enunciated by this Court in *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123 (1969).

> "In applying the 'clearly erroneous' standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind

> that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' "

It was expressly this standard which the court below disregarded when it said

> " 'we are in as good a position as the trial judge' to determine the issue".

In a line of cases led by *Soptra Fabrics Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2d Cir. 1974)[3], there cited below, the Court of Appeals for the Second Circuit has read out of the law, or considered inapplicable to its deliberations, the necessity of a finding under Rule 52(a) of "clearly erroneous" to reverse a finding. It disregards that standard in reversing a finding of fact by a District Court whenever it believes it is reviewing documentary evidence and not the credibility of witnesses. This goes back in judicial history to a statement of Learned Hand in *Eddy* v. *Prudence Bonds Corporation*, 165 F.2d 157, 163 (2d Cir. 1947), *cert. den.*, 333 U.S. 845 (1948).

> ". . . appellate courts have untrammelled power to interpret written documents."

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[3] See *Concord Fabrics, Inc.* v. *Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2 Cir. 1969); *Milworth Converting Corporation* v. *Slifkam*, 276 F.2d 443, 445-446 (2d Cir. 1960); *Orvis* v. *Higgins*, 180 F.2d 537, 539 (2 Cir. 1950), *cert. den.*, 340 U.S. 810 (1950).

Even before *Zenith, supra* the conflict in the circuits on this issue was recognized in other circuits. Said the Court of Appeals for the Sixth Circuit in *United States Steel Corporation* v. *Fuhrman*, 407 F.2d 1143, 1145 (6th Cir. 1969)

> "Our research reveals a split of authority among circuits on this point . . ."

In *Fuhrman*, the court held that it was bound by the "clearly erroneous" rule even though the District Judge heard no live evidence. To the same effect is *Local Union 1219 etc.* v. *United Brotherhood of Carpenters & Joiners*, 493 F.2d 93, 96 (1 Cir. 1974); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 454 F.2d 527, 530 (1 Cir. 1972); *Leach* v. *Crucible Center Co.*, 388 F.2d 176, 179 (1 Cir. 1968); *Smith* v. *United States*, 502 F.2d 512, 519 (5 Cir. 1974); *United States* v. *Florida*, 482 F.2d 205, 207, 208 (5 Cir. 1973); *Lambros* v. *Commissioner of Internal Revenue*, 459 F.2d 69, 72 (6 Cir. 1972); *Porter* v. *Commissioner of Internal Revenue*, 388 F.2d 670, 671 (6 Cir. 1968); *Traylor* v. *United States*, 418 F.2d 262, 264 (6 Cir. 1969); *Schnadig Corp.* v. *Gaines Mfg. Co., Inc.*, 494 F.2d 383 (6 Cir. 1974); *Aetna Casualty and Surety Co.* v. *Hunt*, 486 F.2d 81, 84 (10 Cir. 1973); *Case* v. *Morrisette*, 475 F.2d 1300 (C.A.D.C. 1973). Contra: *Teamsters Local U. No. 688* v. *Crown Cork & Seal Co., Inc.*, 488 F.2d 738, 740 (8 Cir. 1974); *Arrow Equipment Inc.* v. *M-R-S Manufacturing Co.*, 416 F.2d 152 (8 Cir. 1969); *Securities and Exchange Commission* v. *Coffey*, 493 F.2d 1304, 1311 (6 Cir. 1974) relying on *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2 Cir. 1972) [Former Associate Justice Tom Clark dissenting] Cf. *Aunt Mid* v. *Fjell-Oranje Lines*, 458 F.2d 712 (7 Cir. 1972), *cert. den.*, 409 U.S. 877 (1972). *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n. 9 (1963).

When Rule 52(a) was adopted in 1937, the Advisory Committee said:

> "It [Rule 52(a)] is applied to all findings in cases tried without a jury whether the finding is of a fact concerning which there was a conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony." Moore *Federal Practice* ¶52.04, p. 2680.

It thus appears that the court below in making its finding *de novo* that there was no similarity between the plaintiffs' copyrighted work and the defendants' works, violated the express language of Rule 52(a) since the District Court had found otherwise. The court below did not say that the findings were clearly erroneous but said, instead, it could review the facts as though there had been no prior determination. It further violated the holding in *Zenith* v. *Hazeltine, supra*, and is part of a long line of cases in the Second Circuit which disregard Rule 52(a), if the credibility of witnesses is not at issue. Although there is a split in circuits, other circuits have followed the Second Circuit. This issue is ripe for decision by this Court.

II.

The court below violated the basic rule of appellate review—to read the record—and erroneously reversed on a mistaken view of the facts.

The point above—that the findings of a District Judge should not be reversed unless clearly erroneous—is underlined by the fact in this case that the court below did not look at all the exhibits. Had it done so and looked at the video tape of defendants' puppet presentation (Exhibits 12, 13), it would have observed that both the plaintiffs' and defendants' stories were set in Russia. Later

defendant in the "Tuesday at Home" article changed the setting considered by the court as an "important component of the work" to Africa. On the mistaken belief that all of the defendants' stories were set in Africa, the Court of Appeals reversed the finding of fact of similarity of the defendants' works to plaintiffs'.

This error occurred at least in part because the court made its findings on points not briefed by counsel. The only issue briefed and argued by appellants and appellees was whether or not the trial court had erred as a matter of law on the factual record in deciding that plaintiffs' work was not covered by copyright protection because it was based on a Russian folktale and derivative, and in doing so in the absence of any evidence of another work in the public domain. The court at the very least should have returned the issue it thought important to counsel for briefing and reargument. Cl. *Connell Construction Co.* v. *Plumber & Steamfitter*, 421 U.S. 616 (1975). Such briefing and reargument by plaintiff would have demonstrated the many other "spotted dog" similarities between the plaintiffs' original work and the defendants' copies that sustain the charge of plagiarism. These similarities were recognized by the trial court.

III.

The court below denied plaintiffs their constitutional and statutory right to copyright protection.

Read together the decisions below of the District Court and the Court of Appeals have an Alice-in-Wonderland quality. On the practical side, they deny a creator and author the right recognized in the Constitution of the United States (Art. I, sec. 8, cl. 8) to copyright protection. Cf. *Holmes* v. *Hurst*, 174 U.S. 82, 85 (1899); *Goldstein* v. *California*, 412 U.S. 546, 555 (1973). It has been said:

> ". . . intellectual property is, after all, the only absolute possession in the world. . . The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property."
>
> Nathanial S. Shaler, Harvard Geologist in 1878, quoted by Solberg, *Copyright Reform* 14 Notre Dame Lawyer 343, 358 (1939).

Plaintiff, Mrs. Reyher, initially was told that her work was not entitled to copyright protection because it was derivative—because it was based on a Russian language folktale in the public domain. This holding of the District Court obtained even though there was no evidence adduced of any other such story as she told, or as a source for the claimed infringing work, and even though 17 U.S.C. § 209 gives presumptive validity to an author's certificate of copyright and, even if derivative, such copyright under 17 U.S.C. § 7 is valid even if the copyrighted work is a translation of another work. Nimmer: *The Law of Copyright* § 39 (1976).

No other source for defendants' infringing work was shown to the court below or to the appellate court. The court below effectively found similarity and access but ruled in favor of defendants on erroneous legal grounds. The Court of Appeals affirmed the District Court on a different ground completely, which required it to disregard evidence before the District Court. Thus was Mrs. Reyher's valid copyright action defeated by a two-cushion, two-court shot.

This Court has before it an issue basic to the right of any author to protect the result of his imagination and industry, up to now considered his property if he or she has complied appropriately with the copyright law. The process involved below has effectively denied the right of copyright to petitioner.

CONCLUSION

This Court should issue the writ and grant petitioner a hearing.

October 1, 1976

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 143—September Term, 1975.

(Argued October 31, 1975 Decided April 5, 1976.)

Docket No. 75-7278

REBECCA REYHER and RUTH GANNETT,

Plaintiffs-Appellants,

v.

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Defendants-Appellees.

Before:

MULLIGAN, OAKES and MESKILL,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, John M. Cannella, *Judge*, dismissing plaintiffs' copyright infringement complaint after trial without a jury.

Affirmed.

ELEANOR JACKSON PIEL, Esq., New York, New York, *for Appellants.*

EUGENE L. GIRDEN, Esq., New York, New York (Carleton G. Eldridge, Jr., Esq., Paul B.

Jones, Esq., Coudert Brothers, New York, New York, of counsel), *for Appellees.*

Paul P. Selvin, Esq., Butler, Jablow & Geller, New York, New York, *for Amicus Curiae, Writers Guild of America.*

Meskill, *Circuit Judge:*

Plaintiffs below, Rebecca Reyher and Ruth Gannett, appeal from an order of the District Court for the Southern District of New York, John M. Cannella, *Judge,* dismissing their copyright infringement complaint after a two day trial without a jury. We affirm the district court's disposition of this case on the ground that there was no substantial similarity between the two works as to copyrightable matter.

Appellants Reyher and Gannett are the author and illustrator respectively of a children's book entitled "My Mother Is The Most Beautiful Woman In The World" which was published with notice of copyright on August 24, 1945. Appellee Children's Television Workshop ("CTW") is the producer of the educational children's television program known as "Sesame Street" and the publisher of *Sesame Street Magazine.* Appellee Tuesday Publications, Inc. ("TPI") is the publisher of a monthly periodical known as *Tuesday At Home,* which is distributed by several newspapers across the country.

The complaint alleges that CTW and TPI infringed and are continuing to infringe plaintiffs' copyright by publishing an illustrated story entitled "The Most Beautiful Woman In The World," which plaintiffs claim was copied from their book without their knowledge or consent. The plaintiffs further assert that CTW infringed their copyright by producing, performing, taping, and tele-

vising, without knowledge or authorization, a television skit entitled "The Most Beautiful Woman In The World."

The defendants deny any infringement of plaintiffs' copyright. They contend that a thematic idea is not protected by copyright and further, that as a "retold" folk tale, the story line involved here is in the public domain. A two day trial was held before Judge Cannella. The three key witnesses were appellant Reyher, Jon Stone, author of the allegedly infringing script and executive producer and head writer for "Sesame Street," and Tibor Gergely, the artist who illustrated the script for *Sesame Street Magazine.*

Reyher testified that her book "My Mother Is The Most Beautiful Woman In The World" had its genesis in a story told to her as a child in Russian by her Russian mother. While she could not repeat this story verbatim, she stated that she had "taken a storyline . . . [and] adapted it . . . . [It was her] treatment . . . even though it was [her] mother's story." Later in her testimony, Reyher said she had only "assumed" that the story was a Russian folktale known to others.

Stone testified that he remembered the theme used in his script from a story told to his younger sister more than 20 years ago. Denying that he had ever seen appellants' work in any form, Stone stated that he used no source for his script other than his memory. Tibor Gergely, the artist who had sketched the allegedly infringing illustration of the reunion scene between mother and child, testified that he had referred to no outside materials when illustrating the story, although he remembered the story from a book read during his childhood in Europe; further, he stated that since he had never seen appellant Gannett's illustrations, any similarity in the drawings of the reunion scene was coincidental.

Judge Cannella dismissed the infringement claim. He noted that there was substantial similarity between the two works because "[w]hile defendants' rendition of the story takes place in a different locale and is told with fewer frills . . . both stories present an identical sequence of events." He concluded, however, that since Reyher testified that the story line in her book was "substantially taken from, if not identical with, the story told to her by her mother" and since she failed to show that she had added anything to the story or changed it in any significant way, Reyher's book was a derivative work, i.e., one "substantially copied from a prior work in the public domain." Reyher'c copyright thus protected only *her* original product, which did not include the plot. The court found no textual copying.[1] In comparing the two illustrations, the district court concluded that the differences between them were so substantial as to preclude a finding of infringement. 387 F.Supp. 869 (S.D.N.Y. 1975).

Initially we feel that we must note our grave doubts about the district court's characterization of Reyher's book as a derivative work. In addition to the classes of works eligible for copyright protection under 17 U.S.C. § 5, Section 7 of Title 17 permits copyrighting "adaptations, . . . translations, or other versions of works in the public domain," so long as the contributions made by the author to the previously existing work are not merely trivial. The protection afforded by § 7, however, is limited solely to the author's additions to the prior underlying work. Generally, "[a] work is not derivative unless it has substantially copied from a prior work. If that which is borrowed consists merely of ideas and not of the expression of ideas, then although the work may have in

1 The district court found little, if any, paraphrasing and also noted that the only phrase which appeared in both works was "Once upon a time, long, long ago."

part been derived from prior works, it is not a derivative work." 1 M. Nimmer on Copyright § 39 at 166-167 (1975) (hereinafter "Nimmer"). This statement presents, we think, the proper perspective from which to evaluate Reyher's book.

Reyher admittedly borrowed the "idea" embodied in the story from her mother. The basic plot of this children's book is very simple. *See* discussion *infra*. Reyher's presentation of the story line was entirely her own. Aside from its theme, she could neither recall the exact story her mother told nor the precise language used. More importantly, no tangible or intangible prior work was proved with sufficient detail to enable a court to judge either whether substantial copying of anything other than the idea of the prior work had occurred or which part of her adaptation constituted her own new, and thus protected, material. In light of the absence of such evidence, to characterize Reyher's work as derivative merely because she used memories of her mother's story would create problems in protecting any literary endeavor as well as exacerbate the difficulty in determining the protection to be afforded a particular effort.

Although we disagree with the district court's "derivative work" rationale, we nevertheless affirm its dismissal of this case on the ground that any similarities between the two works related only to non-copyrightable matter. In reaching this conclusion, we must overturn the trial court's factual finding that there were substantial similarities between the two works. While we recognize that our appellate function usually does not include factfinding, where, as here, the determination of similarity rests solely on a a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the factfinder, "we are in as good a position as the trial judge" to deter-

mine the issue. *Soptra Fabrics Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2 Cir. 1974); *Concord Fabrics, Inc.* v. *Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2 Cir. 1969) (*per curiam*); *Millworth Converting Corporation* v. *Slifka*, 276 F.2d 443, 445-446 (2 Cir. 1960); *cf. Orvis* v. *Higgins*, 180 F.2d 537, 539 (2 Cir.), *cert. denied*, 340 U.S. 810 (1950). *See* 1 Nimmer § 140 at 607.

In an infringement action, a plaintiff must establish ownership of the copyright and copying by the defendant. *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.*, 335 F.Supp. 415, 419 (S.D.N.Y. 1971); 1 Nimmer § 141 at 611. As was done in the instant case, ownership is commonly proved by production of the copyright registration certificate. Because of the inherent difficulty in obtaining direct evidence of copying, it is usually proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works. *Arnstein* v. *Porter*, 154 F.2d 464 (2 Cir. 1946); *Bevan* v. *Columbia Broadcasting System, Inc.*, 329 F.Supp. 601 (S.D.N.Y. 1971). "[I]f there are no similarities, no amount of evidence of access will suffice to prove copying." *Arnstein* v. *Porter, supra*, 154 F.2d at 468.

It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself. *Mazer* v. *Stein*, 347 U.S. 201, 217 (1954); *Baker* v. *Selden*, 101 U.S. 99, 102-103 (1879). This principle attempts to reconcile two competing societal interests: rewarding an individual's ingenuity and effort while at the same time permitting the nation to benefit from further improvements or progress resulting from others' use of the same subject matter. "In the case of verbal 'works' it is well settled that although the 'proprietor's' monopoly extends beyond an exact reproduction of the words, there can be no copyright in the 'ideas' disclosed but only in their 'expression.' Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2 Cir. 1960) (L. Hand).

The difficult task in an infringement action is to distill the nonprotected idea from protected expression. In *Nichols* v. *Universal Pictures Corporation*, 45 F.2d 119, 121 (2 Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), Judge Learned Hand articulated his "abstractions test" by noting that "[u]pon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out . . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas' to which, apart from their expression, his property is never extended." Attempting to further delineate this boundary, one commentator has stated that "protection covers the 'pattern' of the work . . . the sequence of events and the development of the interplay of characters." [2]

While the demarcation between idea and expression may not be susceptible to overly helpful generalization, it has been emphasized repeatedly that the essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization. *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 54 (2 Cir.), *cert. denied*, 298 U.S. 669 (1936); *Burnett* v. *Lambino*, 204 F.Supp. 327 (S.D.N.Y. 1962); *Bevan* v. *Columbia Broadcasting System, Inc., supra*, 329 F.Supp. at 605. Another helpful analytic concept is that of "scenes a faire," se-

2 Z. Chafee, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 503, 513 (1945).

quences of events which necessarily follow from a common theme. "[S]imilarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity." 1 Nimmer § 143.11 at 626.2; *see* Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 462 (1951). Copyrights, then, do not protect thematic concepts or scenes which necessarily must follow from certain similar plot situations. Thus, "no one infringes, unless he descends so far into what is concrete [in a work] as to invade . . . [its] 'expression'." *National Comics Publications* v. *Fawcett Publications*, 191 F.2d 594, 600 (2 Cir. 1951). An example illuminating these somewhat theoretical statements may be helpful at this point. In *Nichols* v. *Universal Pictures Corporation, supra*, the author of the play "Abie's Irish Rose" claimed that her work had been infringed by defendant's film "The Cohens and The Kellys." The court found that the only matter common to the two stories, a "quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation," was not protected by copyright; similarly, the four characters common to both plays were prototypes too indistinct to merit copyright protection. The court concluded that "[a] comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters," was not within the protection afforded by copyright because this theme was part of plaintiff's ideas.

The question which remains is whether defendants in the instant case utilized the idea in Reyher's book or instead descended so far into the concrete as to invade her expression. We must first note that both stories, intended for children, are necessarily less complex than some other works submitted to pattern analysis. *See, e.g., Bevan* v.

Columbia Broadcasting System, Inc., supra; Nichols v. *Universal Pictures Corporation, supra.* Therefore, in addition to the essential sequence of events, we might properly consider the "total concept and feel" of the works in question. *Roth Greeting Cards* v. *United Card Company*, 429 F.2d 1106, 1110 (9 Cir. 1970).

Reyher's thirty-five page book focuses on a Russian family living in the Ukraine; the setting of the story is an important component of the work. The main protagonists are the mother, father and six year old daughter. The first few pages describe the duties of each family member in harvesting the wheat crop. There is also narrative about the customary feast days during harvesting as Reyher describes, through the literary device of the little girl helping her mother, the preparation of distinctive Russian foods. The feast day itself is depicted with vivid details of costume and entertainment. We have now progressed through fifteen pages of appellant's book. On the last day of field work prior to the feast, the little girl is separated from her parents. Meeting a group of villagers unfamiliar to her, she describes her mother as the most beautiful woman in the world. The village leader sends boys to bring back all the likely candidates; none, of course, is the mother. Finally, a homely woman, in fact the girl's mother, approaches the crowd and is joyfully reunited with her child. The village leader presents the moral of the story: "We do not love people because they are beautiful, but they seem beautiful to us because we love them." At the feast day, the little girl tells her mother that, although other children have teased her about her feelings, she thinks her mother is the most beautiful woman in the world. The mother expresses her happiness that her child sees with her heart as well as with her eyes.

The *Sesame Street Magazine* version of the story, two pages long, presumably is set in Africa. There is no textual

detail about African life; any information comes from the five illustrations, which show African dress on the characters, a woman carrying a basket on her head, and thatched huts. The story opens with a little boy crying in the fields because he has become separated from his mother. He describes her as the most beautiful woman in the world. The village leader gathers all the beautiful women from surrounding villages to no avail. An old unattractive woman, the missing mother, is reunited with her son. The village leader states that although he doesn't find her beautiful, the important thing is what the little boy thinks. The lesson to be learned is "[w]hat's not so beautiful to some can be very, very beautiful to others."

Based on the special relationship between parent and child, both works present the thematic concept that to a lost child, the familiar face of the mother is the most beautiful face, even though the mother is not, in fact, beautiful to most.[3] The overlapping sequences of events concern the lost child finding his or her mother, albeit with some difficulty because of the description given. This similarity of events, however, may be considered "scenes a faire," scenes which necessarily result from identical situations.[4] Thus, where a lost child is the protagonist, there is likely to be a reunion with parents. Furthermore, the morals stated by the two stories differ in emphasis. Reyher's book focuses on how love makes people appear

3 Appellants do not, and could not, claim that the title of their book is within copyright protection. *Arnstein* v. *Porter*, *supra*, 154 F.2d at 474.

4 As well stated by Judge Yankwich in his article, *Originality in the Law of Intellectual Property*, *supra*, 11 F.R.D. at 464-465, "[S]imilarity of theme so obviously calls for similarity of treatment that originality will be made to reside in the association and grouping of materials, the delineation of character, the conflict and the other elements which are the very essence of a dramatic production, . . . representing human beings in action or in conflict."

beautiful, while the CTW story stresses that what is beautiful to some may not be beautiful to others. More importantly, however, the two works differ in "total feel." Reyher's book presents a picture of family life in the Russian Ukraine and develops the characters of the little girl and her mother. The CTW story is barren of meaningful setting or character development in its attempt to present its theme. The two stories are not similar in mood, details or characterization. Since both present only the same idea, no infringement as to protected expression occurred. The district court's finding that the two illustrations of the reunion scene have such substantial differences as not to warrant a finding of infringement is one we will not disturb.

Affirmed.

beautiful, while the CTW story stresses that what is beautiful to some may not be beautiful to others. More importantly, however, the two works differ in "total feel." Reyher's book presents a picture of family life in the Russian Ukraine and develops the characters of the little girl and her mother. The CTW story is barren of meaningful setting or character development in its attempt to present its theme. The two stories are not similar in mood, details or characterization. Since both present only the same idea, no infringement as to protected expression occurred. The district court's finding that the two illustrations of the reunion scene have such substantial differences as not to warrant a finding of infringement is one we will not disturb.

Affirmed.

APPENDIX A

District Court Opinion Dismissing the Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM OPINION

72 Civ. 627 (JMC)

REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

—against—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Defendants.

CANNELLA, *D.J.:*

This copyright infringement action was tried to the Court without a jury. After consideration of the facts presented and the law applicable thereto, the Court finds for the defendant and dismisses the complaint.

The plaintiffs herein, Rebecca Reyher and Ruth Gannett, the copyright holders, and respectively the author and illustrator of a children's book entitled, "My Mother Is the Most Beautiful Woman in the World," allege that the defendants, Children's Television Workshop ("CTW") and Tuesday Publications, Inc. ("TPI"), have copied said book and, have, thereby infringed upon plaintiffs' copyright. The alleged infringement occurred when CTW, a non-profit corporation, engaged in, among other activities, the production of the educational children's television program known as "Sesame Street", produced and caused

to be shown on television a segment of the "Sesame Street" program entitled "The Most Beautiful Woman in the World" and when, thereafter, CTW caused articles to be published in both the English and Spanish language versions of the Sesame Street Magazine entitled "The Most Beautiful Woman in the World." Finally, it is alleged that TPI infringed upon plaintiffs' copyright by causing the publication, in an edition of "Tuesday at Home," of a story entitled "The Most Beautiful Woman in the World".

Plaintiffs' book, which was copyrighted in 1945, tells a simple but pointed story. In essence, it relates the tale of a small Russian peasant girl who is lost in the Ukraine. The little girl, having been separated from her mother, makes her way to a village where she tells the inhabitants only that "my mother is the most beautiful woman in the world." Upon hearing this, the villagers proceed to search the surrounding area and to bring all of the local beauties to see the little girl in the hope that one of them will turn out to be her mother. Eventually, the little girl's mother does appear; she is, to the villagers' surprise, a rather homely looking woman. The little girl, however, is not surprised and tells the villagers, "this is my mother, the most beautiful woman in the world." The moral, as the village leader points out, is that "we do not love people because they are beautiful, but they seem beautiful to us because we love them."

It is clear to this Court, having viewed the relevant "Sesame Street" segment and read the three magazine articles involved, that there is a substantial similarity between plaintiffs' copyrighted book and defendants' allegedly infringing works. Although the only phrase

which appears in both works is "Once upon a time, long, long ago," and although there is little, if any, actual paraphrasing of plaintiffs' book in defendants' works, no individual comparing the works at bar could help but conclude that they are substantially similar. While defendants' rendition of the story takes place in a different locale and is told with fewer frills than plaintiffs', both stories present an identical sequence of events.

Nonetheless, before it can be determined whether there has been an infringement of plaintiffs' copyright, the Court must first determine exactly what is protected by that copyright. In the instant case, we have a book which the author candidly admits is based upon a story which was told to her by her Russian mother. It is the belief of plaintiff Reyher (although no direct evidence was adduced to this effect) that the story told to her by her mother is in fact a Russian folk tale. It is clear from plaintiff's testimony that the story line as it appears in her copyrighted book is substantially taken from, if not identical with, the story told to her by her mother. Mrs. Reyher testified that she had "taken a storyline, but I have adapted it and that's a synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what this book is, even though it was my mother's story." (Tr. 120)

Plaintiff did not testify that she had added anything to the story or changed it in any significant way. In fact, the plaintiff indicated that she wrote the book using a Russian dictionary. This clearly suggests a process whereby plaintiff attempted to recall the story as told to her by her mother in Russian, and then to translate that recollection into English. As plaintiff Reyher herself explained the process,

> [i]t not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was an impression rather than a literal translation. Anything that I used that she [her mother] had told me might have been a translation, but it also was primarily a mood and mine was an interpretation. (Tr. 71-72)

It is thus clear to the Court that plaintiffs' book is a "derivative" work. That is, it has been "substantially copied from a prior work" in the public domain. (1 M. Nimmer on *Copyright* § 39 at 166). The accepted rule as restated in the propesed copyright law (*see Goodis* v. *United Artists Television, Inc.*, 425 F.2d 397, 402-03 (2d Cir. 1970); *Rohauer* v. *Killiam Shows, Inc.*, 379 F.Supp. 723, 728 (S.D.N.Y. 1974)), is that "[t]he copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work. . . ." As one court has put it, if the work allegedly infringed upon is of a derivative nature,

> [t]he plaintiff . . . should be expected to state to us what it is in the story that is copyrightable as new and novel and what part of such material, if any, has been misappropriated by the appellant.
>
> In the case at bar, if it be assumed that there are such similarities between [the two stories] as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an

> infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable. The copyright of the story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another. *Harold Lloyd Corp.* v. *Witwer*, 65 F.2d 1, 22-24 (9th Cir. 1933). *See also Axelbank* v. *Rony*, 277 F.2d 314, 317 (9th Cir. 1960).

Given the derivative nature of plaintiffs' work, the plaintiffs can prevail only if defendants have copied material which was plaintiffs' "original intellectual product" as opposed "to the old public domain elements of which [the author] has made use." *Costello* v. *Loew's Corp.*, 159 F.Supp. 782, 784 (D.D.C. 1958). Here, Reyher's "original intellectual product" surely includes the translation of her mother's story, and it just as surely does *not* include the plot or sequence of events appearing therein. There is no allegation and the facts will not support a finding that the defendants have either copied plaintiffs' work verbatim, or have paraphrased it. The most that could be said is that they have read the plaintiffs' work and have retold the story in their own words. Such a finding will not, given the derivative nature of plaintiffs' work, support a cause of action for copyright infringement. The defendants have not infringed upon any substantial portion of plaintiffs' copyrighted book in which plaintiffs can claim a proprietary interest granted by the copyright laws. In a sense, the defendants have done nothing more than make their own variation of the story Mrs.

Reyher's mother had told her as a child. There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher, herself. Thus, defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws.

In addition to the claim that the defendants have copied the story appearing in "My Mother is the Most Beautiful Woman in the World," plaintiffs allege that a drawing by Tybor Gergley, depicting the reunion scene at the conclusion of the story, appearing in defendant TPI's publication "Tuesday At Home," infringed upon an illustration by Ruth Gannett appearing in plaintiffs' copyrighted book. The Court, having compared the Gannett drawing with that by Tybor Gergley, finds that the Gergley illustration does not infringe upon Gannett's work.

In determining whether or not the Gergley illustration of the reunion scene is an infringement of Gannett's drawing of the same event, it is helpful to recall the words of Judge Learned Hand in a case involving the infringement of a textile design copyright:

> The test for infringement of a copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in their "expression." Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore

> inevitably be *ad hoc*. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible. No one disputes that the copyright extends beyond a photographic reproduction of the design, but one cannot say how far an imitator must depart from an undeviating reproduction to escape infringement. *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

Although the two illustrations here at issue do evince more than a passing similarity (in both the reunited mother and child are depicted running toward each other with arms similarly outstretched, in both the child's feet are positioned with the left foot raised in a similar fashion, finally, in both the posture of the mother and the relative positioning of the mother and child are similar), it is this Court's finding that the differences between the two (the characters in the more impressionistic Gergley illustration are black Africans dressed in their native garb, while in the Gannett drawing they are Caucasians in Russian peasant outfits, additionally, the Gergley child is a boy while Gannett's is a girl, and the Gergley mother has a package on her back and a stick at her feet while the Gannett mother is shown without accoutrements) are so substantial that the "average layman would indeed detect numerous differences . . . which tend to eliminate any substantial similarity of protected expres-
Jewelry Co., Inc., No. 74-1774 (2d Cir. Dec. 20, 1974)
Jewelry Co., Inc., No. 74-1774 (2d Cir. Dec. 20, 1974)
slip op. at 934 (footnote omitted). Thus, it cannot be said that the Gergley illustration infringes upon Gannett's work.

For the reasons set forth above, it is hereby ordered that the complaint be and hereby is dismissed, with costs, but without attorney's fees, to the defendants.

The foregoing constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Enter Judgment.

JOHN M. CANNELLA,
U.S.D.J.

Dated: New York, N.Y.
January 6, 1975.

APPENDIX A

District Court Opinion Dismissing Defendants' Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 627 JMC

REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

—against—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Defendants.

CANNELLA, *J.*

MEMORANDUM

Motion by the defendants for summary judgment dismissing the complaint as a matter of law, made pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, is denied.

In this copyright infringement action the plaintiffs, author and illustrator, allege that the defendants unlawfully copied their work, "My Mother Is The Most Beautiful Woman In The World" by virtue of the defendants' television production and subsequent magazine publication of a "substantially similar" folk story. On this motion it is not necessary to fully set forth the facts of this case or state the allegations of the parties, indeed, to do so would disserve the interests of judicial economy. All that is necessary to preclude summary judgment is the

existence of a genuine issue as to a material fact or facts. Such facts are here present and the instant motion is denied.

A defendant's motion for summary judgment in a copyright infringement case should be granted only in the rarest instances. *See*, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); S. Rothenberg, Legal Protection of Literature, Art and Music, § 188 at 203 (1960); M. Nimmer, Nimmer on Copyright, § 138 at 599-600 (1965). *Arnstein* v. *Porter*, *supra*, clearly the leading national authority on motions of the instant nature, is controlling here. The following excerpts from Judge Frank's opinion in *Arnstein*, in which Judge Learned Hand joined, interlineated to reflect the facts of the instant case, are dispositive on this motion. 154 F.2d at 468-470.

> The principal question on this appeal is whether the lower court, under Rule 56, properly deprived plaintiff of a trial of his copyright infringement action. The answer depends on whether "there is the slightest doubt as to the facts." [Citations omitted] In applying that standard here, it is important to avoid confusing two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved went so far as to constitute improper appropriation.
>
> As to the first—copying—the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying. Of course if there

are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ("dissection") is relevant, and the testimony of experts may be received to aid the trier of the facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.

If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue (as noted more in detail below) the test is the response of the ordinary lay hearer; accordingly, on that issue, "dissection" and expert testimony are irrelevant.

In some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation. But, such double-purpose evidence is not required; that is, if copying is otherwise shown, proof of improper appropriation need not consist of similarities which, standing alone, would support an inference of copying.

Each of these two issues—copying and improper appropriation—is an issue of fact.

We turn first to the issue of copying. After listening to the compositions as played in the phonograph recordings submitted by defendant [after reading plaintiffs' book and defendants' tele-

vision script and magazines stories] we find similarities; but we hold that unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied. The similarities, however, are sufficient so that, if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence.

Summary judgment was [is] then, proper if indubitably defendant did not have access to plaintiff's compositions. Plainly that presents an issue of fact. . . .

. . . [E]even if we were to disregard the improbable aspects of plaintiff's story, [no tale of thugs or stooges is told herein] there remain parts by no means "fantastic." On the record now before us more than a million copies of one of his compositions were sold; copies of others were sold in smaller quantities or distributed to radio stations or band leaders or publishers, or the pieces were publicly performed. [Plaintiff's book was first published 28 years ago. It enjoys a worldwide distribution. It has been reprinted in whole or in part in various anthologies and collections, and has been the subject of educational films and television and radio programs. For a four year period the plaintiff author conducted a weekly radio program on which she was introduced as the author of this book. The book here involved has also received mention in several nationally syndicated newspaper columns.] [1] If, after hearing both

[1] Reyher Affidavit, pp. 4-7.

parties testify, the jury disbelieves defendant's denials, [here, as in Arnstein, defendants' author, Jon Stone, completely denies any access to plaintiffs' book,] [2] it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the "crucial test of credibility"—in the presence of the jury.[3] Plaintiff, or a lawyer on his behalf, on such examination may elicit damaging admissions from defendant; more important, plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief.

To be sure, plaintiff examined defendant on deposition. But the right to use depositions for discovery, or for limited purposes at a trial, of course, does not mean that they are to supplant the right to call and examine the adverse party, if he is available, before the jury. For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives. As we have said, "a deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand"

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[2] Stone Deposition.

[3] Judge Frank's footnote 8. "He would be so entitled if the trial were before a judge without a jury." 154 F.2d at 470.

for it deprives "of the advantage of having the witness before the jury." It has been said that as "the appearance and manner of the witness" is often "a complete antidote" to what he testifies, "we cannot very well overestimate the importance of having the witness examined and cross-examined in presence of the court and jury." . . .

"The right of a party, therefore, to have a witness subjected to the personal view of the jury, is a valuable right, of which he should not be deprived * * * except by necessity. And that necessity ceases whenever the witness is within the power of the court, and may be produced upon the trial."

With all that in mind, we cannot now say—as we think we must say to sustain a summary judgment—that at the close of a trial the judge could properly direct a verdict. [footnotes omitted]

No more need be said. *See also*, Higgins v. Baker, 309 F. Supp. 635, 637-638 (S.D.N.Y. 1970); Nordstrom v. Radio Corporation of America, 251 F. Supp. 41 (D. Colo., 1965); Harris v. Fawcett Pub., Inc., 176 F. Supp. 390, 394 (S.D.N.Y. 1959); MacDonald v. DuMaurier, 75 F. Supp. 653, 654 (S.D.N.Y. 1946); 6 J. Moore, Moore's Federal Practice ¶ 56.17 [14], at pp. 2515-2519 (1972); Nimmer, *supra*, § 138.

The defendants' brief on the motion contains a series of interesting arguments on the merits of this case; these arguments must properly await another day. After a full plenary trial the court will resolve the merits of

the instant action according to the facts proved and the applicable law, and it is then that the arguments herein advanced by the defendants should be made.

The papers submitted on the instant motion evidence the completion of substantial pre-trial discovery and, therefore, the court directs that the instant action be placed on the court's Ready Calendar fifteen (15) days from the date of this memorandum.

Defendants' motion for summary judgment, pursuant to Fed. R. Civ. P. 56(b), is denied.

So ordered.

/s/ JOHN M. CANNELLA
U. S. D. J.

Dated: New York, N. Y.
January 25, 1974

APPENDIX B

Rule 52(a) Federal Rules of Civil Procedure

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

Article I, § 8, cl. 8

Constitution of the United States: Act 1, § 8, cl. 8;

§ 8 Powers of Congress

Section 8. The Congress shall have Power . . .

17 U.S.C. § 101

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

§ 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction.—To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringment, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not

be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First: In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second: In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third: In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth: In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

(c) Impounding during action.—To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) Destruction of infringing copies and plates.—To deliver upon oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

76-

No. 473

REBECCA REYHER,

Petitioner,

v.

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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REBECCA REYHER,

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Questions Presented

The Petition for Certiorari (p. 2) attempts to present two questions. The first claims without support of any kind that the Court of Appeals for the Second Circuit "disregarded and ignored the record and * * * reached a contrary decision." The second question raises a false issue by incorrectly stating the trial court's findings of fact.

The Court of Appeals affirmed the District Court's dismissal of petitioner's complaint on the same grounds that supported the District Court's legal conclusion; *i.e.*, "on the ground that any similarities between the two works related only to non-copyrightable matter." 533 F.2d page 90* and 387 F. Supp. 871.

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* The Opinions are reproduced in the Petition at pp. 1a-19a.

In reaching its conclusion, the Court of Appeals revised the trial court's legal analysis supporting the conclusion and overturned a non-controlling finding of fact based entirely upon a review of documentary evidence. Thus the sole question presented by the petition is whether the Court of Appeals exceeded its jurisdiction under Rule 52(a) of the Federal Rules of Civil Procedure.

Statement of the Case

The petitioner's complaint charges copyright infringement in that the respondents' works* are claimed to be copied from the petitioner's children's book entitled "My Mother is the Most Beautiful Woman in the World", a folktale retold by Becky Reyher. After extensive oral and written discovery, respondents moved for summary judgment before trial, contending that since the similarities between the competing works arose only from the use of the same folktale admittedly used by petitioner, she was precluded as a matter of law from recovery in an action predicated upon a claim of copyright infringement. By memorandum decision, dated January 28, 1974, Judge John M. Cannella denied the respondents' motion for summary judgment, holding that by reason of the similarity of story line there existed a question of fact precluding summary judgment. Thereafter, the District Court sitting without a jury conducted a full trial on the merits on April 23 and 24, 1974.

Both the petitioner and the respondents submitted trial memoranda and after trial submitted proposed Findings of Fact, Conclusions of Law and post-trial memoranda.

* Respondents' works are fully itemized and described by the District Court in the opinion of the Hon. John M. Cannella reported at 387 F. Supp. 869 and reproduced in the petition at pp. 12a-19a.

On the evidence, Judge Cannella concluded that petitioner's work consisted *entirely* of translating a Russian language folktale and that therefore the work must be regarded as "derivative". The Court also found that since there was no textual duplication of any of petitioner's intellectual product (her translation) and since the similarities in story line were the product of a common public domain source, petitioner could not succeed under the copyright statutes. For these reasons, Judge Cannella dismissed the petitioner's complaint.

Thereafter, petitioner moved the District Court, pursuant to FRCP Rules 52(b) and 59(b), (d) and (e) to reconsider, to amend its Findings of Fact and Law and to make additional Findings, to amend its judgment dismissing the complaint and in the alternative to grant petitioner a new trial. By order dated April 1, 175 Judge Cannella granted the motion to reconsider, reconsidered and denied the petitioner's remaining motions.

Petitioner then appealed to the Court of Appeals for the Second Circuit and both petitioner and respondents submitted briefs addressing the questions (1) whether the District Court erred in characterizing petitioner's children's book as "derivative" if the book consisted of an English translation of a Russian language folktale which the author admitted to having heard from her mother during her childhood, and (2) whether the District Court properly dismissed the complaint claiming copyright infringement, if there was no proof of access and if the similarities between respondents' and petitioner's work derive solely from the idea embodied in a public domain folktale upon which each author admittedly relied.

Writing for the Court of Appeals, Judge Meskill expressed "grave doubts" about the District Court's characterization of petitioner's book as a derivative work,

explaining his reasons therefor, modified the analysis and overturned the finding of substantial similarity upon its independent review of the works in issue. Nonetheless, the Court of Appeals affirmed the District Court's dismissal of petitioner's complaint on the same ground that supported the District Court's legal conclusion; *i.e.*, "that any similarities between the two works related only to non-copyrightable matter." 533 F.2d at page 90 and 387 F.Supp. at page 871.

REASONS FOR DENYING THE WRIT

I.

The holdings below do not result in any conflict of decisions.

The petitioner urges this Court to issue a Writ of Certiorari, arguing that "in a line of cases lead by *Soptra Fabrics, Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2d Cir. 1974)", the Court of Appeals for the Second Circuit has considered a finding of "clearly erroneous" inapplicable to deliberations concerning the reversal of the lower court findings under Rule 52(a) of the Federal Rules of Civil Procedure. She argues further that the Second Circuit "disregards that standard in reversing a finding of fact by a District Court whenever it believes it is reviewing documentary evidence and not the credibility of witnesses."

Specifically, petitioner refers to the language appearing at 533 F.2d page 90, where the Court of Appeals stated in the present proceedings that:

> "While we recognize that our appellate function usually does not include fact finding, where, as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the fact finder, 'we are in as good a position as the trial judge' to determine the issue. *Soptra Fabrics Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2 Cir. 1974); *Concord Fabrics, Inc.* v. *Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2d Cir. 1969) (per curiam); *Millworth Converting Corporation* v. *Slifka*, 276 F.2d 443, 445-446 (2 Cir. 1960); *cf. Orvis* v. *Higgins*, 180 F.2d 537, 539 (2 Cir.) *cert. denied*, 340 U.S. 810, 71, S.Ct. 37, 95 L.Ed. 595 (1950). See 1 Nimmer § 140 at 607."

Respondents respectfully submit that the Court of Appeals for the Second Circuit's view of the scope of appellate review under Rule 52(a) as reflected above is consistent with the principles articulated by this Court and with those articulated by the various other circuits. On the basis of the quoted language, however, petitioner claims not only that the Second Circuit has violated the principles enunciated by this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) but also that its decision reflects a split of authority in the Circuits which requires resolution by this Court. Respondents do not agree with either of these contentions.

The language of this Court cited by petitioner in support of her argument is found in *Zenith, supra,* at page 123. The quoted language constitutes a reminder to the reviewing courts that there are limits to the scope of appellate review and states two requirements. The first is that the authority of the appellate court is circumscribed by the deference it must give to the decisions of the trier of fact "who is usually in a superior position to appraise and weigh evidence." *Id.* at 123. The second is that upon re-

view of the lower court's findings, the question for the appellate court is "whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 123. This quoted language in *Zenith* was first stated in *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948) where this Court said that Rule 52(a) prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous" and stated further that the rule applies to inferences drawn from documents or undisputed facts. *Id.* at 394. The Court also observed however that the rule was intended to reflect the equity practice of giving great weight to the findings of the trial court when dependent upon assessment of the candor and credibility of witnesses.*

In that case moreover, this Court rejected the finding of the trial judge that defendants in an antitrust action had not acted in concert, remarking that "the witnesses denied that they . . . had agreed to do things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, . . ." *Id.* at 396.

It was in view of the foregoing language in *United States Gypsum* that Judge Frank, writing for the Court of Appeals in *Orvis* v. *Higgins,* 180 F.2d 537, 539 (2d Cir. 1950) *cert. den.* 340 U.S. 810 (1950) held that "where a trial judge sits without a jury, the rule varies with the character of the evidence . . . we may ignore the trial judge's finding and substitute our own . . . if the trial judge's finding must rest exclusively on the written evidence or the

* There, at page 395, the Court cited 2 Street, Federal Equity Practice (1909) §§ 1510, 1514; *Furrer* v. *Ferris,* 145 U.S. 132; *Tilghman* v. *Proctor,* 125 U.S. 136, 149-50; *District of Columbia* v. *Pace,* 320 U.S. 698, 701; *Virginian R. Co.* v. *United States,* 272 U.S. 658, 675.

undisputed facts, so that his evaluation of credibility has no significance . . . but where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances."

In reaching that conclusion, Judge Frank observed early in his opinion that:

> ". . . holding that the findings of trial judges were not 'clearly erroneous' within the meaning of Rule 52(a) . . . we have often stressed the importance of a trial judge's advantage over us when he saw and heard the witnesses as they testified. We have pointed out our inability to appraise the cogency of demeanor evidence, lost to us because it cannot be captured in the witness' words as recorded on paper." (citations omitted)

Thus the Court of Appeals view in *Orvis* reflects both the caution of the "clearly erroneous" rule applied on appellate review and it recognizes the practical realities which permit the reviewing court to conduct an independent examination of findings which rest entirely upon documentary evidence.

It is the *Orvis* view which underlies the statement below that:

> ". . . [W]here, as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the fact finder, 'we are in as good a position as the trial judge' to determine the issue." 533 F.2d 90.

In *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.,* 505 F.2d 989 (2d Cir. 1974), moreover, the Court

of Appeals rejected the same broad interpretation of the cases led by *Orvis* and *Soptra* as urged by the present petitioner, stating at page 1004 that

> "*Orvis* stands for the proposition that a record consisting only of pleadings, depositions, and affidavits may, at the reviewing court's discretion, be reviewed de novo. It does not control a case like the present one, in which a great deal of the evidence consisted of third party testimony as to the statements and intentions of others."

Thus given the limits to the principle stated in *Orvis,* in *Soptra* and in the present proceedings in the court below, respondents submit that the Court of Appeals' application of this Court's directive on the scope of review under Rule 52(a) is faithful to the purpose and scope of that provision and that it is consistent with the views expressed in other circuits.*

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* See *e.g., Soles* v. *Franzblau,* 352 F.2d 47 (3rd Cir. 1965), *cert. den.* 383 U.S. 911 (1966); *Ball* v. *Paramount Pictures, Inc.,* 169 F.2d 317 (3rd Cir. 1948); *Volkswagen of America, Inc.* v. *Jahre,* 472 F.2d 557 (5th Cir. 1973); *Thomas* v. *Commissioner of Internal Revenue,* 254 F.2d 233, 236 (5th Cir. 1958); *Securities and Exchange Commission* v. *Coffey,* 493 F.2d 1304 (6th Cir. 1974), *cert. den.* 420 U.S. 908 (1975); *Fritz* v. *Jarecki,* 189 F.2d 445 (7th Cir. 1951); *Teamsters, Local Union No. 688* v. *Crown Cork & Seal Company, Inc.,* 488 F.2d 738 (8th Cir. 1973); *Brinker-Johnson Company* v. *Barnes,* 272 F.2d 250 (9th Cir. 1959); *Mid-Continent Casualty Company* v. *Everett,* 340 F.2d 65 (10th Cir. 1965): See also, Vol. 5A, Moore's Federal Practice, ¶ 52.04; but see *Merril Trust Co.* v. *Bradford,* 507 F.2d 467 (1st Cir. 1974); *Nalle* v. *First National Bank of Baltimore,* 412 F.2d 881 (4th Cir. 1969).

II.

The Court of Appeals' review of the District Court's findings is contemplated by Rule 52(a) of the Federal Rules of Civil Procedure.

The petitioner argues further that the Court of Appeals for the Second Circuit affirmed the decision of the District Court dismissing petitioner's complaint upon "completely different grounds" and that in so doing it abused the principles of Rule 52(a) of the Federal Rules of Civil Procedure. This contention, however, is based upon both incorrect reading of the Court of Appeals opinion and a misinterpretation of Rule 52(a), *supra.*

The Court of Appeals sustained the District Court's legal conclusion on the same finding of fact which supported the District Court's dismissal of the complaint after a full trial on the merits; *i.e.,* "on the ground that any similarities between the two works related only to non-copyrightable matter". See 533 F.2d at Page 90 and 387 F.Supp. at page 781. It is only in the application of the "derivative work" principles that the courts differ in their analysis, but this difference in legal analysis neither violates the principles of Rule 52(a) nor changes the outcome.

In the District Court, Judge Cannella examined all of the testimony and evidence offered at trial and summarized the salient features in his opinion, pointing out at 387 F.Supp. 870 that:

> "In the instant case, we have a book which the author candidly admits is based upon a story which was told to her by her Russian mother. It is the belief of plaintiff Reyher (although no direct evidence was adduced to this effect) that the story told to her by her mother is in fact a Russian folk tale.

> It is clear from plaintiff's testimony that the story line as it appears in her copyrighted book is substantially taken from, if not identical with, the story told to her by her mother . . ."

In addition, the record shows that petitioner acquiesced in the notations appearing in her copyright registration, certificate of copyright and book fly-leaf, reading "A Russian Folk tale retold by Becky Reyher"* (pp. 1a, 4a-5a, *infra*). As pointed out by the District Court at 387 F.Supp. 870, petitioner:

> "did not testify that she had added anything to the story or changed it in any significant way. In fact, [petitioner] indicated that she wrote the book using a Russian dictionary. This clearly suggests a process whereby [petitioner] attempted to recall the story as told to her by her mother in Russian and then to translate that reco'lection into English."

Given these facts, Judge Cannella concluded that petitioner's book was a derivative work. "That is, it has been 'substantially copied from a prior work' in the public domain. (1 M. Nimmer on Copyright § 39 at 166)." Id. at 870.

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* In Point III of her argument, petitioner now urges that "there was no evidence adduced of any other such story as she told . . ." In view of the record, however, it is difficult to fathom the basis upon which petitioner makes this assertion. Having asserted upon registering for copyright and having consistently maintained throughout these proceedings—in answers to interrogatories, in sworn testimony before trial and again at trial—that her work is based upon a Russian folk tale, petitioner is now estopped from claiming that there is no public domain source for her work. *Huie* v. *National Broadcasting Company, Inc.*, 184 F. Supp. 198 (S.D.N.Y. 1960); and for the operation of judicial admissions, see *Gadaleta* v. *Nederlandsch Amerekaansche Stoomvart*, 291 F.2d 212, 213 (2d Cir. 1961); *Giarafla* v. *Moore-McCormick Lines, Inc.*, 270 F. Supp. 342 (S.D.N.Y. 1967); 9 Wigmore on Evidence, 3rd Ed. §§ 2590, 2591 and 2593.

Upon comparison of petitioner's work and respondents' works, Judge Cannella also concluded that in his view there was substantial similarity between the works in issue but held that the similarities rested in the use of a common idea and sequence of events both of which were necessary elements of the folktale and thus entirely within the public domain. Accordingly, he concluded that "defendants' use of a story line which is substantially similar to that appearing in plaintiff's copyrighted book does not give rise to a cause of action under the copyright laws." 387 F.Supp. at 871.*

The Court of Appeals for the Second Circuit agreed with Judge Cannella's conclusion and affirmed the dismissal of petitioner's complaint "on the ground that any similarities between the two works related only to non-copyrightable matter." 533 F.2d at 90. Given petitioner's fact

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* Petitioner claims that the District Court found both substantial similarity and "access" as elements supporting her claim of copyright infringement. On the "access" point, petitioner refers to an excerpt from Judge Cannella's opinion and argues on the basis of the excerpt that the District Court found respondents had access to petitioner's work. The excerpt reads: "The most that *could be said* is that they have read the plaintiff's work and have retold the story in their own words." In the context of the opinion, it is clear that this statement was made to make the point that *even if* defendants had seen the plaintiff's work there would be no evidence sufficient to support the finding of copyright infringement. It merely assumes access for the purpose of the argument, but in view of the evidence was clearly not intended to suggest the respondents did in fact have access to petitioner's work. In her answers to interrogatories before trial, petitioner admitted that she had no evidence of access and at trial she presented no evidence of access, relying entirely upon the circulation of her book. In addition, Jon Stone, the man who authored the respondents' works, testified that he heard the same folktale from either his mother or a babysitter telling the story to his younger sister around 1950 (p. 9a, *infra*). Working for Children's Television Workshop, he retold that story from his own memory as a part of the Sesame Street Children's Educational Program (p. 9a, *infra*). Naturally the story he told had the same sequence of events as that appearing in petitioner's work and it is this which gives rise to the non-actionable similarities found by Judge Cannella.

testimony, however, the Court of Appeals expressed "grave doubt" and disagreed with Judge Cannella's legal characterization of petitioner's book as a "derivative work" pointing out that the petitioner

> "could neither recall the exact story her mother told nor the precise language used. More importantly, no tangible or intangible prior work was proved with sufficient detail to enable a court to judge either whether substantial copying of anything other than the idea of the prior work had occurred or which part of her adaptation constituted her own new, and thus protected, material. In light of the absence of such evidence, to characterize Reyher's work as derivative merely because she used memories of her mother's story would create problems in protecting any literary endeavor as well as exacerbate the difficulty in determining the protection to be afforded a particular effort."

In its extensive discussion of the difficulties in distilling the nonprotected idea from the protected expression in copyright infringement actions (533 F.2d 90-91), the Court of Appeals overturned the District Court's finding of substantial similarity, affirming the principle that "[S]imilarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity," citing 1 Nimmer § 143.11 at 626.2 and Yankwich "Originality in the Law of Intellectual Property" 11 FRD 457, 462 (1951).*

* In connection with its discussion of the delineation between nonprotected idea and protected expression, the court relied upon the principles enunciated in *Nichols* v. *Universal Pictures Corporation,* 45 F.2d 119, 121 (2 Cir. 1930), *cert. den.* 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795 (1931); *Sheldon* v. *Metro-Goldwyn Pictures Corporation,* 81 F.2d 49, 54 (2d Cir. 1936), *cert. den.* 298 U.S. 669 (1936); *Burnett* v. *Lambino,* 204 F. Supp. 327 (S.D.N.Y. 1962); *Bevan* v. *Columbia Broadcasting System, Inc.,* 329 F. Supp. 601 at 605 (S.D.N.Y. 1971); *National Comics Publications* v. *Fawcett Publications,* 191 F.2d 594, 600 (2d Cir. 1951). The petitioner urges that the Court of Appeals failed to examine the Sesame Street Video Tape Muppet Presentation, arguing implicitly that if it had done so it would have observed "substantial similarity" between the disputed works. The contention, however, is of no moment since the fact is that by virtue of the use of the folktale, the story line in each of respondents' works is the same. Furthermore, the District Court, sitting without a jury, did view the muppet video tape (exhibits 12, 13) and concluded that petitioner's complaint must be dismissed despite its findings of substantial similarity, holding that the "defendants have not infringed upon any substantial portion of plaintiff's copyrighted book in which plaintiff can claim any proprietory interest covered by copyright laws." 387 F.Supp. at 781. Thus, the Court of Appeals omission of specific reference to the muppet video tape in its opinion can hardly support the petitioner's contention that a review of its content would offer further evidence in support of petitioner's claim.

Both the District Court and the Court of Appeals for the Second Circuit agreed on the central issue:

> "there being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher, herself. Thus, defendants' use of a story line which is substantially similar to that appearing in the plaintiff's copyrighted book does not give rise to a cause of action under the copyright laws." 387 F.Supp. at 871.

Respondents submit that the Court of Appeals' review in the proceedings below amounts to the type of review contemplated by FRCP Rule 52(a) and by this Court in *United States Gypsum Co., supra.* Whether the trial court's findings be characterized as findings of law or findings of fact based upon documentary evidence, it is subject to modification by the reviewing court "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395.

That view has been affirmed by this Court. In footnote nine at pages 194 and 195 of this Court's opinion in *United*

States v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963), Mr. Justice Clark found the trial court's conclusion "clearly erroneous" where it found the parties' concerted activities were not motivated by a common purpose on the questions of "mutual interest" in the achievement of an agreement to assign a patent, stating that:

> "Insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law. Insofar as the conclusion is based on 'inferences drawn from documents or undisputed facts, . . . Rule 52(a) of the Rules of Civil Procedure is applicable.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948) . . . The evidence here, including many findings of the trial court, clearly compels the conclusion that the parties' concerted activities were motivated by a common purpose, and the court's conclusion to the contrary must be regarded as clearly erroneous. *United States* v. *United States Gypsum Co., supra;* see *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.*, 178 F.2d 541 (C.A. 9th Cir. 1949)".

Petitioner can hardly claim that the review conducted by the Second Circuit in these proceedings exceeded the boundaries of Rule 52(a). Insofar as the District Court's conclusion derived from the application of an improper standard to the facts, "it can be corrected as a matter of law." Insofar as it derived from a review of documentary evidence, it can be given "little weight". Thus, on the cited authority, respondents submit that the Court of Appeals properly reviewed the findings of the District Court.

CONCLUSION

The Court should deny the Writ of Certiorari.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

(71) heard it or from whom, if at all? A. Of my own knowledge?

Q. That's correct, of your own knowledge. A. No.

Q. You do not know? A. No.

Q. So you do not know of your own knowledge that this was a folktale told from mother to child, or anyone else, in any other way in the Ukraine, or anywhere else? A. I only know it was one of the stories my mother told me and she told me a great many.

Q. All right. In what language did your mother tell you that story? A. She told it to me in Russian. And I would like to interpose that I only spoke Russian until I was five, except for a very few words that I spoke to my Negro nurse.

Q. When you wrote your book, you wrote it, I take it, in the English language? A. Yes.

Q. Did that require a translation of what you had heard from your mother? A. It not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was an impression rather (72) than a literal translation. Anything that I used that she had told me might have been a translation, but it also was primarily a mood and mine was an interpretation.

Q. Well, would you say that your copyrighted book in suit is a literal translation of what you heard from your mother? A. Not at all.

Q. And in what way does it differ from what your mother told you? A. Could I just say something here and interpose something about the title and what my mother told me?

Q. All right, as an illustration let us refer to the title. A. The title of the book which the judge has and which you have as an exhibit is "My Mother is the Most Beautiful Woman in the World."

Q. That is the title you gave the book? A. That's the title I gave. This was the theme. This was not the title of the Russian story my mother told me from which I retold and adapted my story.

The title and the theme of the book as my mother told it to me translated into English would be "My mama is the most beautiful in the whole world."

In Russian but written phonetically in
(116) That is what he wants to know.

The Witness: Well, I don't know who was the authority for the explicit copyright information.

Q. Did you ever object to that characterization? A. I never objected to it.

Q. I show you Plaintiff's Exhibit 3 in evidence, which is a copy of your book, and I direct your attention to the inside flyleaf which says, "A Russian Folktale Retold by Becky Reyher." Who is responsible for that language being included on the inside flyleaf? A. I would answer in the same way.

Q. What same way? A. As I did before.

Q. That you didn't do it and you didn't authorize it? A. That I—I would like to ask whether I may ask a question when you ask me something.

The Court: No.

The Witness: Not for clarification?

The Court: It is not allowed. You talk to your lawyer when you get through and then if anything has to be clarified your lawyer will put you back on the stand and then he'll ask you questions to clarify it. But right now, as I just reminded the lawyer, each lawyer is entitled to ask the questions in

the form in which he wants, in the (117) direction which he wants and in the area which he wants and unless they are objectionable for some legal reason I will rule upon it. It is your obligation as a witness to answer to the best of your ability.

There are a number of answers which are possible. Amongst them are three little words, "I don't know."

What is the last unanswered question, if there is one?

(Record read)

A. I don't know.

Q. Did you authorize your publisher to include that language? A. I don't recall discussing it with my publisher.

Q. Did you over object to your publisher about the inclusion of that language? A. No.

Q. I direct your attention to the—

The Court: Is it your present position that this is not a Russian folk story?

The Witness: No, it is not my position. My position is that I told it in my own way. I retold it.

The Court: I realize that, but I am asking you now categorically in your opinion is this a Russian folk story which you rewrote?

(118) The Witness: Yes.

The Court: All right, so it is a Russian folk story? That's the genesis of it?

The Witness: Yes.

The Court: That's all he is trying to establish.

The Witness: I was confused.

Q. I ask you the same question with respect to the title, "A Russian Folktale as Retold by Becky Reyher." A. Probably the publisher, but I didn't object.

Q. Did you ever authorize the publisher to use that language? A. It was not under discussion.

Q. Where would he have gotten that if not from you?

The Court: It's very hard to be big like you and I are and tower over a poor little lady sitting in the witness chair trying to collect her thoughts so go back and let her answer you from the counsel table. This is a small room, we can all hear one another.

Didn't you like the design of this book? That looks like a nice front page there. Didn't you look at it after it came out?

The Witness: After it came out and while it was being made.

The Court: You saw that on there and raised no (119) question about it?

The Witness: No.

Q. I direct your attention to the dedication page, the page in front of the title page. Can you read it out loud, please? A. "For my Russian mother Lisa Hourwich who told this story to me when I was a child, and whose stories still seem to me the most beautiful in the world."

Q. Did you write that dedication? A. I wrote that dedication.

Q. Now, without going into Russian translations, can you please tell me the story, to the best of your recollection, that your mother told you when you were a child? A. I couldn't possibly tell you the story that my mother told me when I was a child. I am a great grandmother and my

mother told me hundreds of stories. I couldn't remember the story that my mother told. I told Mr. Eldridge—may I just—that there was a storyline and that appeared in your testimony.

Q. What was the storyline that you recall that your mother told you? A. The storyline is very simple. It's the story of a child who is lost, is bewildered, terrified and finally finds people who are willing to held her and tells them about (120) her mother who she thinks is beautiful and they go searching for a beautiful woman and they find the child and reunite them. That is the skeleton of the story.

I would like to say at this point—and I don't know if the judge will overrule me—that there is a famous basis for literature, boy meets girl.

Mr. Girden: Your Honor—

The Witness: And I have taken a storyline, but I have adapted it and that's the synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what this book is, even though it was my mother's story.

Q. All right, now, Mrs. Reyher, you testified that innumerable times your story has been read over the radio, sometimes with your permission and sometimes without, is that correct? A. I would not know, but I know if it was without my permission, and I would know if it had been with my permission over the years.

Q. And you stated that hundreds of times the book has been used as the basis for story telling in libraries, is that correct? A. Yes, there is a special library edition of this book and innumerable testimonials from librarians as to the

(153) A. I am the executive producer and head writer of Sesame Street.

Q. For what period of time have you been associated with Sesame Street as executive producer and head writer? A. As executive producer for the last two years. I was the original head writer and then there was a period of several years in between when there was another gentleman performing that function.

Q. When did Sesame Street start? A. It went on the air in November of 1969.

Q. Prior to your association with Children's Television Workshop, did you have any experience in the television field, particularly with respect to children's programming? A. I was immediately prior to Sesame Street, a free-lance producer producing specials, developing projects for networks.

Prior to that, I was the producer of Captain Kangaroo and wrote that program.

Q. On CBS? A. Yes, and I wrote that program, too, for six years.

Q. In what period of time did you first enter the television field? A. January of 1956.

Q. Have you been continuously in the television field (154) with a stress of children's programming continuously since that time? A. Yes.

Q. Can you please tell the Court what Sesame Street is? A. It's an experimental educational television program which is intended to prepare preschool children for the school experience.

Q. By "preschool," you mean five and under? A. Three, four, and five would be the target audience.

Q. In the period of time from the inception of the program in 1969, say, through the end of 1970, what was your

particular function with respect to the program? A. I was one of several producers and my primary duties were as head writer.

Q. How many times a week was the program produced? A. On the air?

Q. Yes. A. It's on the air daily for at least an hour and in most markets it's on the air several hours a day.

Q. Is Children's Television Workshop a nonprofit organization? A. Yes.

Q. Does it exist by outside grants? (155) A. Primarily, yes.

Q. And are the programs over public television? A. They are.

Q. Are the programs sponsored? A. No.

Q. In the period November of 1970, approximately how many programs per week were you writing and producing? A. I was writing two scripts a week and editing the other scripts.

Q. How did you go about picking subject matter for any particular program? Let's concentrate on the program of November 18, 1970. Do you recall how you picked the subject matter for that program? A. The show was written according to a very strictly structured curriculum. Sesame Street has a number of educational goals and they are divided by a curriculum coordinator over the 130 programs that we would produce in any given season. For the particular day you have mentioned, there would have been —there was—a curriculum page which told me as the writer what areas I was to cover in terms of curriculum on that given day.

Mr. Girden: I would like marked as Defendants' Exhibit A for identification a curriculum sheet for show number 138.

(Defendants' Exhibit A marked for identification.)

(156) Q. I show you Defendants' Exhibit A for identification and ask if you can identify it? A. Yes.

Q. How do you identify it? A. That would be the curriculum sheet for show number 138.

Q. Was the show broadcast on November 18, 1970? A. I believe so.

Mr. S. Stoll: Is there any reference here to the Sesame Street presentation of "The Most Beautiful Woman in the World"?

Mr. Girden: We will get to that, Mr. Stoll.

Mr. S. Stoll: Subject to tying it in, I won't object to it if they can tie it in.

The Court: All right, received with that condition.

(Defendants' Exhibit A for identification received in evidence.)

Q. I show you Defendants' Exhibit A in evidence and ask you who prepares these curriculum sheets. A. This one was prepared, I believe, by Joan Lufrano, L-U-F-R-A-N-O.

Q. When you receive that curriculum sheet, how do you then go about structuring the program of the day in question? A. It would be my responsibility as a writer to (157) incorporate as many of these curriculum items as I possibly could into the show for that particular day.

Q. Was there a particular curriculum item on that particular day which eventually led to the writing of "The Most Beautiful Woman in the World"? A. There is, under the general heading of "Cognitive Organization," subheading "Perceptual Discrimination," there was the assignment "Objective-Subjective Discrimination."

At that time we had two separate curriculum goals. One was "Subjective-Objective Discrimination." The other was "Differing Perspectives." They have since been lumped together under the general heading because we found they were so similar they weren't really treated as separate items.

The point of view to be gotten across, which is a very important early education object, is what may look one way to one person oftentimes looks different to another person.

Q. Did you make the determination how you would depict that orally and visually to your Sesame Street audience? A. I did.

Q. How did you make this determination? A. Well, I remembered this story in years past and thought it was an excellent example of just that, this (158) differing perspective.

Q. From what period of time in your life do you recall this story? A. It was a story that was told to my sister when she was a very young child, and my sister was fifteen years younger than I am, so she was a child. This would have been around 1950 when she was about five years old.

Q. Approximately 22 to 24 years ago? A. Yes, approximately.

Q. Do you recall hearing this story told to your sister? A. Well, I recall the story told at that time. I don't recall specifically who told it to her. It was a favorite of hers. It was almost certainly either my mother or a woman called Mrs. Looney, who was a daily babysitter and helper in our household.

Q. What did you recall in your memory of the story as you heard it? Approximately 24 years ago. A. I remembered the shape of the story as a sort of folktale, fairy tale idea.

Q. Can you please recite for the record what it is you remembered of the story as you heard it in around 1950? A. Well, the story, as best I can recall it some 20 odd years later, would be, "Once upon a time, many years ago," (159) and I remember it being characterized as being in Russia.

Some people were out working one day and they heard a child crying. So they found out who it was and they discovered a little boy and the little boy was crying so hard he couldn't talk very well. So they said to him, "Who is your mother?"

And then the boy stopped crying for a minute and he said, "Oh, my mother is the most beautiful woman in the world."

They said, "That's easy enough, just find the most beautiful woman and bring her around and that would be the boy's mother."

So they did. They brought the most beautiful woman around and the boy said to her, "No, that's not my mother, my mother is the most beautiful woman in the world."

They said, "Who is the most beautiful woman in our village? Maybe we better go farther afield."

They went farther away and kept bringing back beautiful women and showed them to the little boy. And the little boy said, "No, that's not my mother. She's the most beautiful woman in the world."

By that time someone came to the crowd gathered by this time, and it was somebody whose hands were worn from working in the field and quite old and gray-haired and eyes (160) red from crying. And the little boy immediately identified her as his mother and said, "Mother."

And they were terribly surprised and said, "But this surely can't be your mother. You told us your mother was the most beautiful woman in the world."

The boy said, "She is, look at her."

The point being that what is beautiful for one person may not be to another.

Q. Did you tell that story as the example of the differing perspective facets of your program? A. Yes.

Q. What did you do next? A. The next step I would normally take is decide what form the story should take, that is, should our live actors act it out on a set or in another set, or would it best be deferred and be made into a film or an animation. And I decided to do it with puppets. I used a form I do frequently on the show and that is a narrator.

Q. Did you write the scripts for the segment we are talking about? A. I did.

Q. How do you go about writing the scripts? A. I take a legal-size yellow pad and make notes to myself in pencil and from those notes I type the script.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 473

REBECCA REYHER,

Petitioner,

—v.—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents would have this Court believe that the decisions of the District Court and the Court of Appeals—directly and diametrically in conflict with one another—are congruent and consistent with one another and, accordingly, there is no issue for this Court to decide.

Say respondents:

> "The Court of Appeals affirmed the District Court's dismissal of petitioner's complaint *on the same grounds that supported the District Court's legal conclusion*" (Resp. Br. p. 1) (emphasis supplied).

Such a statement of respondents is untrue and at direct variance with what the Court of Appeals below said:

". . . we must overturn the trial court's factual finding that there were substantive similarities between the two works." (Pet. 5a).

Respondents assert that there was no reversal of the District Court on any fact issue by the Court of Appeals as alleged by petitioner. The District Court held, say respondents, that plaintiff's entire work—a children's story about a child's love for her mother—was in the public domain because it was a folk tale. Therefore, say respondents, any copying of the story line—the locale or anything else which the court held took place—was fair game and not copyright infringement.

The respondents then, in an act of legerdemain, say the Circuit Court did not disturb this ruling even though that court held that the work was not derivative or in the public domain because there was no other source but plaintiffs' copyrighted story in evidence. That court held there was no copyright infringement because there was no similiarity between the stories. Respondents concede the trial court found similarity and looked at a video tape of Sesame Street moppet theatre set in Russia just as was plaintiffs' story (footnote Resp. Br. p. 13). No matter, say respondents, the appellate court neglected to review this evidence and stated unequivocally and in error that respondents' second shortened version, a story set in Africa with the same plot, was the only version in evidence (Pet. 9a). The appellate court then looked to that change of locale to Africa as a pivotal reason for finding no similarity between the two works of plaintiffs and defendants (Pet. 9a).

If this Court permits this to stand, an appellate court is entitled to disregard, negligently or capriciously, the evidence and the ruling of the trial court in violation of Rule 52(a). It need not find the trial court's ruling

"clearly erroneous" as the rule requires because it may look or not look, as it chooses, at the documentary evidence and come to its own conclusion. Moreover, (and here the non-sequitur becomes worse)—it need not even look at the documentary evidence if it comes to the same overall conclusion of the trial court whether or not it reverses on the law or fact.

Responding to I (Resp. Br. pp. 4-8)

It is this conclusion urged by respondents which would obfuscate the thrust of petitioners' argument. It is clear from the long list of cases cited by petitioner that the Circuit Courts of Appeal are in conflict on the issue of their obligation under the law and F.R.C.P. 52(a) (Pet. p. 10). The issue raised by petitioner—that there is such a conflict in the Circuits—is not met by respondents at all.

Instead, respondents argue at length on the standards of review to be invoked by a reviewing court faced with making the determination of whether or not the trial court's finding of fact is clearly erroneous.

Respondents have failed to comprehend what Judge Frank discussed in *Orvis* v. *Higgins*, 180 F.2d 537 (2 Cir., 1950). There the court held the trial judge's fact finding "clearly erroneous" (180 F.2d at 540). The discussion which preceded the finding of "clearly erroneous" referred to the standards to be applied by an appellate court in deciding that issue and gave no authority to disregard the express language of Rule 52(a) which requires the finding of "clearly erroneous" by the appellate court before it may reverse the trial court. *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2 Cir. 1974), cited by respondents, is

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"clearly erroneous" as the rule requires because it may look or not look, as it chooses, at the documentary evidence and come to its own conclusion. Moreover, (and here the non-sequitur becomes worse)—it need not even look at the documentary evidence if it comes to the same overall conclusion of the trial court whether or not it reverses on the law or fact.

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of no help since the court there affirmed the District Court fact finding and rejected as a matter of law the contention urged by appellants that the trial court's fact finding was "clearly erroneous".

Respondents further have muddied the waters by the listing of eleven cases in a footnote on page 8 of its brief to support the proposition it urges that there is consistency on this issue among the Circuit Courts of Appeal. Instead, those cases support petitioner's contention that there is indeed confusion in the application of Rule 52(a) among the circuits, and that the issue is ripe for decision and clarification by this Court. Viz:

(a) Cases which say:

Findings of fact are reversible without a finding of "clearly erroneous" where the ultimate fact is based on inferences from undisputed facts.* *Soles* v. *Franzblau*, 352 F.2d 47 (3 Cir. 1965), *cert. den.*, 383 U.S. 911 (1966); *Ball* v. *Paramount Pictures, Inc., et al.*, 169 F.2d 317 (3 Cir. 1948); *Thomas* v. *Commissioner of Internal Revenue*, 254 F.2d 233 (5 Cir. 1958); *Securities and Exchange Commission* v. *Coffey*, 493 F.2d 1304, 1311 (6 Cir. 1974), *cert. den.*, 420 U.S. 669 (1936); *Fritz* v. *Jarecki*, 189 F.2d 445 (7 Cir. 1951).

(b) Cases which say:

Rule 52(a) always requires a finding of "clearly erroneous", but the showing of erroneous need not be as compelling if the evidence is mainly documentary; *Volks-*

* This is indeed a qualification of the rule, which restated, might be advanced as an appellate court's right to reverse on the law or on mixed questions of law and fact.

wagen of America, Inc. v. *Jahre*, 472 F.2d 557 (5 Cir. 1973); *Brinker-Johnson Company* v. *Barnes*, 272 F.2d 250 (9 Cir. 1959); *Mid-Continent Casualty Company* v. *Everett*, 340 F.2d 65, 70 (10 Cir. 1965).*

(c) A case which says:

The "clearly erroneous" rule does not apply to construction of written documents: *Teamsters Local Union No. 688* v. *Crown Cork & Seal Company, Inc.*, 488 F.2d 738 (8 Cir. 1973).

(d) Cases which say:

Rule 52(a) means that the Court of Appeals is bound by trial court findings even though based on documentary evidence, unless they are "clearly erroneous": *Nalle* v. *First National Bank of Baltimore*, 412 F.2d 881 (4 Cir. 1969); *Merrill Trust Company* v. *Bradford*, 507 F.2d 467 (1 Cir. 1974). Also see cases listed p. 10 of Petition.

Responding to II (pp. 9-14)

Respondents assert in contradiction to the opinions below that

> "The Court of Appeals sustained the District Court's legal conclusion on the same finding of fact which supported the District Court's dismissal of the complaint after a full trial on the merits; i.e. 'on the ground that any similarities between the two works related only to non-copyrightable matter'. See 533 F.2d at Page 90 and 38 F.Supp. at page 781."

* Test of "clearly erroneous" is there defined as whether "a mistake has been committed".

If we refer to the pages indicated we read that the District Court said:

> ". . . plaintiffs' book is a 'derivative' work. That is, it has been 'substantially copied from a prior work' in the public domain . . . Reyher's 'original intellectual product' . . . does not include the plot or sequence of events appearing therein . . . the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child . . . Thus defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws." (Pet. 15a-17a).

On the other hand, the Court of Appeals said:

> "Although we disagree with the district court's 'derivative work' rationale, we nevertheless affirm its dismissal of this case on the ground that any similarities between the two works related only to non-copyrightable matter. *In reading this conclusion we must overturn the trial court's factual finding that there were substantial similarities between the two works.* While we recognize that our appellate function usually does not include fact-finding, where as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the factfinder, 'we are in as good a position as the trial judge' to determine the issue." (Pet. 5a, 6a) (emphasis supplied).

Respondents simply have overlooked the clear words of the Court of Appeals that it was overturning the "factual finding that there were substantial similarities between the two works," when it stated that the Court of Appeals legal conclusion was based on the "same finding of fact".

Moreover, respondents really rely on the derivative—pubic-domain defense as controlling on the infringement claim—and they do so because the title plaintiffs' book bears is "My Mother is the Most Beautiful Woman in the World",* a folk tale retold by Becky Reyher.

Respondents by footnote attempt to bolster this point (Resp. Br. p. 10) by stating that petitioner is in error in claiming "there was no evidence adduced of any other such story as she told . . ." Moreover, respondents claim petitioner is estopped from claiming her work is in the public domain even though the court below (the Second Circuit) made no such finding. Even if there were a public domain source for plaintiffs' work (and there was no such evidence below) (Pet. 4a, 5a), that fact would not invalidate plaintiffs' copyright nor an action for infringement unless the alleged infringer could show that he consulted and relied on an independent source. *Italian Book Co.* v. *Rossi*, 27 F.2d 1014 (S.D.N.Y. 1928); *Hartfield* v. *Peterson*, 91 F.2d 998, 1000 (2 Cir., 1937); *Banks* v. *McDivitt*, 2 Fed. Cases 759, Case 961 (S.D.N.Y. 1875); *Toksvig* v. *Bruce Publishing Co.*, 181 F.2d 664, 667 (7 Cir. 1950); *Mills Music* v. *Cromwell Music*, 126 F.2d 54, 74 (S.D.N.Y., 1954); *Wihtol* v. *Wells*, 281 F.2d 550, 553, 554 (7 Cir. 1956).

Respondents unsuccessfully attempt to assert that there was no similarity in their infringing work even though Judge Cannella found

> ". . . the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child. There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form

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* Petitioner previously referred in error to the title as "The Most Beautiful Woman in the World". (Pet. p. 3).

> of protection, the defendants have the same right to make use of it as does Mrs. Reyher herself. Thus, defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws." (Pet. 17a).

It is sheer casuistry to say that the Second Circuit has not overturned the district court's fact finding, particularly when it expressly so stated (Pet. 5a).

It is important to all litigants in the federal court and elsewhere to be able to rely on the law that Congress passed (Rule 52a) and to expect the courts to follow and enforce the law. The effect of the two-court action in this case further deprives an original writer and copyright holder of her constitutional and statutory right to protect her property right in her copyright.

CONCLUSION

This court should grant the petition for certiorari.

Respectfully submitted,

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